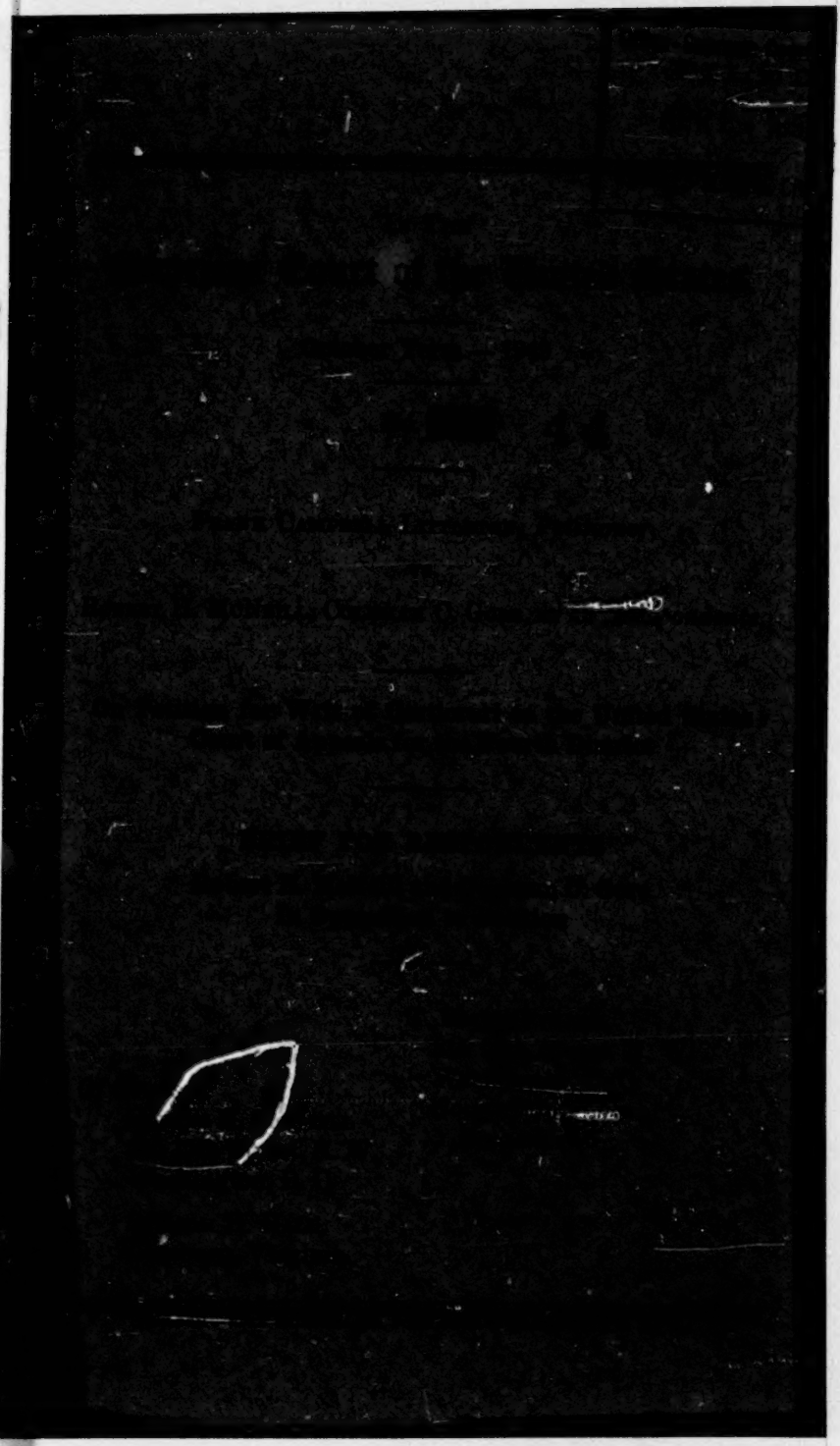

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IN THE

Supreme Court of the United States

October Term — 1949

No. 746

FRANK CAMPBELL LITTLETON, *Petitioner,*

vs.

ROBERT H. McNEILL, COLEMAN C. GORE, ET AL., *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth District

BRIEF FOR THE RESPONDENTS, ROBERT H. McNEILL AND COLEMAN C. GORE, IN OPPOSITION TO PETITION

OPINIONS BELOW

The opinion of the District Court is not reported. It is set forth at R. 60A.

The opinion of the United States Court of Appeals for the Fourth Circuit is reported in 179 F 2d 848. It appears at R. 118.

JURISDICTION

The judgment of the court below was entered on January 12, 1950 (R. 118). The District Court's order on the mandate of the court below was entered on March 9, 1950, after the parties were furnished with a copy of the proposed order and duly notified that it would be presented at a hearing before Judge Hutcheson at Richmond, Virginia, on March 6, 1950. Counsel for the two respondents herein were the only attorneys who appeared at the hearing. Petitioner's motion to withhold distribution was denied by the District Court and his motion to withdraw the mandate was denied by the court below. Petitioner's application to this court filed on April 3, 1950 for recall and stay of mandate of the Court below, *in which he set forth the material facts and issues herein, was denied by Chief Justice Fred Vinson on April 4, 1950.*

The petition for a writ of certiorari was filed on April 12, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254.

QUESTION PRESENTED

Whether the court below properly affirmed the trial court which found that the respondents herein are entitled to recover the amount of their claim with interest thereon from February 4, 1941 against petitioner, as set forth in his farmer-debtor schedule in bankruptcy, which were duly proven and admitted to be true by petitioner, which claim was purchased by the respondents herein at petitioner's written request, and for his benefit and upon his earnest solicitation, and with his full knowledge of the purchase price and all of the other attending circumstances.

STATUTES INVOLVED

The statute which petitioner claims (p. 2) is involved "is Section 75 of the Bankruptcy Act; 11 USC 203, known

as the Farmer-Debtor Law, and such other portions of the Bankruptcy Act, 11 USC as may be applicable."

STATEMENT

The findings of the court below (R. 118), affirming the order of the District Court (R. 74A), which approved the Conciliation Commissioner's recommendations for distribution of assets of petitioner, the farmer-debtor (R. 47-A), may be summarized as follows:

Petitioner filed a petition as farmer-debtor under the Frazier-Lemke Act, 11 U. S. C. A. Sec. 203, et seq. on June 18, 1941 (Opinion below, p. 2; R. 119). Petitioner failed to rehabilitate himself and pay his creditors, but succeeded in preventing a sale of his real property by the trustees appointed by the court, until September 2, 1948, when said property was sold for $220,000, which was sufficient to pay all of the claims against the farmer-debtor, petitioner herein, with interest, as well as expenses of the proceedings, and to leave a surplus. The purchase price of the property was paid and deposited in the registry of the court on December 16, 1948 (Id. R. 120). Although petitioner at first filed objections to the sale, he soon thereafter consented to it and gave a quit-claim deed to the purchaser.

After the sale, the conciliation commissioner's report for distribution was approved by the District Judge after certain modifications, which do not affect the respondents herein. (Id. R. 137, 138).

Petitioner appealed from the District Court's order of May 26, 1949, approving the Conciliation Commissioner's Report (R. 76), including the claim of respondents Robert H. McNeill and Coleman C. Gore, and the court below affirmed those claims and found that petitioner, farmer-debtor-solicited these respondents to purchase the above claim then owned by petitioner's son, requested in writing

that they purchase those claims from his son who "has been actually more insistent that his (petitioner's son) claim be paid than the holders of the first deed of trust notes" (R. 67A); that "The records of this Court and of the Appellate Court (R. 134; 179 F 2d 848) will show that Mr. McNeill sought to obtain the delay desired by his client and he actually succeeded in staving off the final day for about 14 months" (R. 69, 134, the courts below).

The trial court found:

> "I fail to find any breach of trust or confidence on the part of the attorney toward his client. On the contrary, the services rendered by Mr. McNeill resulted in the delay for which the debtor was clamoring. Mr. McNeill was diligent and energetic in pursuing the course desired by his client and during the period offered to further subordinate his lien if a lender could be found who would refinance the debtor. It is my opinion that the note was purchased by McNeill and Gore at a time and under such circumstances as an outside person or lending institution would not ordinarily have been interested in acquiring the note. McNeill and Gore took a chance on purchasing this note and if this chance now results in a profit to them I see no reason why a profit should not be realized where the transaction was in good faith and fair and was entered into with the full knowledge, consent, acquiescence and on the suggestion of the debtor. I find nothing to criticize in the conduct of Mr. McNeill. The claim here discussed will be allowed in full." (R. 70)

The court below found, as did the District Court that,—

> "There was no fraud and no concealment in the business, but all of the facts were well known to the debtor. Indeed the claim was purchased" (by respondents McNeill and Gore) "with the debtor's knowledge and at his request and the price paid was the best that could be obtained after considerable effort had been made to sell the claim. * * *" R. 136; 179 F 2d 848).

"The facts in this case, as found by the District Judge, fall within these principles. The debtor was fully aware of all the pertinent facts. He was necessarily acquainted with the nature and value of the assigned claim and of the property by which it was secured. He well knew of the unsuccessful efforts that had been made to sell the claim for the amount for which McNeill and his associate paid for it, and he not only consented to the transaction but was anxious that it be effected. It follows that the decision of the court allowing the claim in full was correct, and must be sustained." (179 F 2d 848 pp. 858, 859; R. 137, 138)

ARGUMENT

Petitioner has failed to show by references to the record, any error in the trial and the District Court or the appellate courts' findings of fact.

The cases petitioner cites in his petition and brief are utterly foreign to the facts and issues in this case. These cases are where an agent, attorney or fiduciary official, *was guilty of fraud, or concealment in the dealings* with his principal or client, which facts, as found by the courts below in this case, are not involved. (R. 136; 67, 69).

(a) Petitioner's Reasons For Allowance of the Writ Are Without Merit.

Petitioner cites six cases in attempting to support his reasons why this writ should be granted (pp. 12, 13). As stated before, they are utterly foreign to the facts and law applicable to this case. Petitioner's cited cases involve fraud or concealment, or faiilure of consent, without solicitation, or request of the client or principal. Here there was no fraud or concealment, but open, generous and fair dealing, and there was a request and solicitation, with *petitioner's full knowledge of all the facts.* (R. 136, 67, 69).

Petitioner's statement as to "*Reasons For Allowance of the Writ*" (p. 11) i.e. that the "decisions of the Fourth Circuit are contrary to the decisions of Courts of Appeals in other Circuits, is grossly erroneous, and without any foundation in his cited cases.

(1) In *Niehart* v. *Bulk*, 50 F 2d [illegible], CCA 10, (cited by petitioner, p. 12), Niehart was Mills' attorney. Mills, 82 years old, weak and of unsound mind, gave a quit-claim deed to Niehart, who induced the mortgagors to reduce their claims on the farm on which he received the deed. The Court held that the acts of Niehart were fraudulent and that his client was the owner of the equity in the farm.

(2) In *Commonwealth Finance Corp* v. *McHarg*, 282 Fed. 560, CCA 2, McHarg was a director, secretary and treasurer and general counsel of the above corporation. McHarg had the corporation's stock sold to a third party "but in reality for himself. This court held (p. 563) that "* * * an agent who is authorized to sell his principal's property cannot, *without his principal's consent*, purchase the property for himself * * *". In that case it was held to be a dishonest scheme to defraud the client.

(3) Petitioner's next claim (p. 12) is that the Fourth Circuit decisions "run counter to the most solemn declarations of this Court upon the delicate and confidential relations between counsel and client and the duty of counsel and courts to see that they must be zealously guarded," citing

(4) *Texas* v. *White* (in re Paschal), 10 Wall. 483 (19 L. ed. 992), which has no application to the present case, as it applies to attorneys' liens, and clients rights to discharge attorneys and to recover their assets held by their attorneys if and when the clients pay for the services of their attorneys.

(5) *Stockton* v. *Ford*, 11 How. 232, 236 (cited by petitioner p. 12) was where the attorney purchased a judg-

ment against his client *"without communicating the fact to his client, and obtaining his consent."*

(6) *Michand* v. *Girod,* 4 How. 551 (cited by petitioner, p. 12) involved the purchase by the executor of the testator's estate, without consent, decided under the laws of Louisiana. Here the mortgage belonged to petitioner's son exclusively.

(7) *In Jackson* v. *Smith,* 254 U. S. 587 (cited by petitioner, p. 13) a receiver joined with two others, *under a secret agreement,* to purchase property under the receiver's control. This Court held that the estate was entitled to the profits resulting therefrom.

(b) Reply to Petitioner's Argument, (at p. 24)

Petitioner's statement of facts do not conform to the facts found by the Referee, the District Court or the court below, hence they should be disregarded, and as petitioner does not claim that either of the courts below made erroneous findings of fact, the facts here are necessarily limited to the findings made by the courts below. Nor does the record, in any way, contradict these findings.

The findings of the referee, the District Court, and the court below, should be left undisturbed, as there is an absence of clear mistake or error in any respect whatever. In fact *petitioner does not make the findings one of his Issues* (p. 2), or *The Questions Presented* (p. 9) or *Specification of Errors* (p. 19). *Welling* v. *General Industries Co.,* 330 U. S. 545, 550; *District of Columbia* v. *Pace,* 320 U. S. 698, 702). In *Muschany* v. *U. S.,* 324 U. S. 49, 57-58, this court held that since the trial court specifically made findings as to fraud, supported by substantial evidence "it is not for this court to undertake an independent examination of these issues. (Of course the reverse is equally true.) * * * *Therefore this case comes before this Court without any suggestions of fraud or unfairness such as would justify holding the contract invalid."* Such is the *universal rule.*

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A brief summary of the facts shows that Petitioner's only son, and heir, after being unable to sell his claim, involved here, first contacted respondent Gore, who tried ten prospects but was unable to obtain an offer for the claim (R. 67, 68, 95, 96). After this failure by Gore, petitioner asked respondent McNeill to request petitioner's son and wife to come to Mr. McNeill's office for a conference, which was held on February 3, 1948, at which time *petitioner* himself agreed in writing to purchase his son's claim for *$18,600 net* to his son, with a down payment and a certain sum each month thereafter. Petitioner, the following day, stated that he could not purchase the claim and requested respondents Gore and McNeill to purchase it *in order to place the claim in friendly hands, as his son was the most active party in attempting to have his father's property sold, even more so than the holders of the first deed of trust,* and in order to prevent criminal prosecution of his son for issuing certain checks which he did not have sufficient funds to pay (Opinion R. 67). So the agreement between petitioner and his son was cancelled. (R. 87, 88, 107, 108). Petitioner does not raise an issue as to the above facts nor to the fact that these respondents, *at petitioner's request,* purchased the said claim for the *same amount,* as Petitioner was to pay.

Petitioner claims (Brf. p. 25) that these respondents knew that the claim they purchased was worth one hundred cents on the dollar, and so advised petitioner, and that the claim would net a profit of 106%. This Court, as shown by its refusal of certiorari to Petitioner in *Littleton v. Rust,* 334 U. S. 833, as well as the courts below, and the parties able to purchase such a claim, knew that petitioner was a notorious litigant, not only in this bankruptcy case but in other cases over a period of many years. Petitioner had eighteen different lawyers up to the time this case as was stated by the Court below (Opinion p. 10, R. 127). Neither petitioner nor his son could sell the claim. *"For numerous reasons no person could be found who was interested in*

purchasing the note. (District Court Opinion quoted in Appeal Court Opinion, p. 16, R. 133). Petitioner's only interest was to get the claim out of his son's hands and into friendly hands, not only for his son's benefit but his own. Only through the actions of Messrs. McNeill and Gore could these results be accomplished—hence he urged them to buy.

Petitioner claims (Brf. pp. 26, 27) that there was no evidence that petitioner was present when these respondents purchased the claim,—when the contract was drawn and signed. *This statement is utterly contrary to all the evidence.* Petitioner makes the statement that Mr. McNeill's law partner, Mr. Fuller, testified that he (Fuller) was not sure whether petitioner was present when said contract was signed. The testimony shows that petitioner was present when he and his son and these respondents prepared the contract and that petitioner was given a copy of the contract, although said witness was not certain whether he was in the room when the contract was signed or was with this witness in the next room where they were working on a brief for petitioner, as petitioner would come and go from one room to the other, but that petitioner at that time was given a copy of the agreement (R. 108, 109). No part of this testimony was contradicted.

The findings of the courts below conclusively show that petitioner not only knew about the terms of the contract but that he solicited and requested these respondents, orally and in writing, to purchase said claim for the price they paid for it. (R. 132-138).

THE LAW

(Petitioner's brief pp. 27-33)

In each case cited by petitioner in his brief, the facts and law are utterly foreign to those in the present case, as heretofore shown in respondent's reply to petitioner's reasons for granting the Writ (pp. 5-7, supra). Counsel for

petitioner knew, or should have known, that the cases they cite and the facts therein are not applicable to the facts and law here, where there is no fraud, misrepresentation, or concealment of facts, and where the client was not only anxious, but earnestly solicited and requested in writing that these respondents purchase the claim held by his son.

The citation of the cases and facts in petitioner's brief are contrary to the evidence in this case. In fact, the circumstances there as so misstated and applied as to raise the question whether these citations are contrary to Canon 22, of Professional and Judicial Ethics, adopted by the American Bar Association require, Candor and Fairness in dealing with the courts.

Canon 6 (Id) makes an exception from the general rule, as to dealings between attorney and client, stating—

> "* * * except by *express consent of all concerned, given after a full disclosure of the facts.*" (As here).

A similar exception is stated in American Law Institute Agency, Secs. 390-392 p. 878-886—

> "One employed as agent violates no duty to the principal by acting for his own benefit if he makes a full disclosure of the facts to an acquiescent principal and takes no unfair advantage of him * * *" (Id. Se. 390, p. 878.) (See also p. 886, Sec. 392).

This Court in *Robertson* v. *Chapman,* 152 U. S. 673 (cited by petitioner) held that an attorney was at liberty to purchase property he recently sold for his client, where there was no concealment of facts and his client was notified of the sale; that it was not a case where the agent to sell affects a sale to himself under the cover of the name of another person, or where the agent acted without the knowledge or assent of his principal. In the case at bar, respondents did not purchase from petitioner, but from petitioner's son, at petitioner's solicitation and written request.

In *Stiers* v. *Hall*, 170 Va. 569, the Court held—

> "Although such transactions will be closely and carefully scrutinized, yet those which are obviously fair and just will be upheld, and the client is not entitled to absolute relief from such contract, unless it be shown that he suffered some injury through an abuse of confidence on the part of his attorney, 6 C. J. 686. This statement was approved in Sawyer v. Mathews, 166 Va. 177, 184 S. E. 232."

Vol. 7 C. J. S., Sec. 126, pages 961-962, states—

> "* * * there are numerous cases which appear to support the view that the rule against purchases by an attorney is not inexorable and that under proper circumstances such a purchase may be sustained where the attorney has not violated any confidence reposed in him nor *breach* his duty of fidelity. Hence, the purchase may be sustained where the attorney can satisfactorily show that he has acted with his client's consent and that the transaction was in *every* way fair and not to the client's prejudice or disadvantage. Also it has been held that the rule does not preclude a good-faith purchase by the attorney from a third person of a title which has previously belonged to the client."

As stated in 7 C. J. S. Sec. 126, p. 962—

> "Although an attorney has made a purchase which the client has a right to invalidate or claim for his benefit, under the rules stated in the preceding section, the purchase will usually be sustained in the attorney's favor if the client has by his acts or conduct ratified the same or waived his rights or estopped himself from questioning the attorney's title."

The general rule in 5 Am. Jur. Sec. 62 is—

> "EFFECT OF GOOD FAITH: If, however, the client intended that the attorney should make the purchase for himself and acquiesced in his action, the transaction will be upheld if open, honest and fair."

Judge Hutcheson, in making his findings in the District Court, stated that "The law almost universally recognizes

that the relationship of attorneys and client demands that the attorney occupy toward his client a high position of trust and confidence in his relations with his client, and in dealing with his client it is the lawyer's duty to exercise the utmost good faith, integrity, fairness and fidelity. *Byars et al* v. *Stone, et al*, 42 S. E. (2) 847 R. 66, 67). *He then found that Mr. McNeill had not only fulfilled each of the above requirements, but went beyond his duty to petitioner at petitioner's solicitation in joining in the purchase of the claim (a) in order to prevent criminal prosecution of petitioner's son* (Id. p. 66), (b) *to prevent the son from continuing to press for a* sale of petitioner's property (Id. 68), (c) to assist petitioner in borrowing money to rehabilitate himself and to subordinate these respondents' second deed of trust to whatever amount a lending institute might lend to debtor (Id. p. 69), and (d) in purchasing the claim at a time and under such circumstances as an outside person or lending institution would not ordinarily have been interested in acquiring the note, and in taking a chance (Id. p. 70) of losing their entire investment for the reasons heretofore stated. This serious danger and chance has continued from the time the claim was purchased and respondents are even now in danger of losing their security upon which they have borrowed heavily because of the protracted litigation by petitioner in which it is already involved. Respondents are further subjected to unnecessary heavy expenses unjustly caused by petitioner in their effort to collect, such as court costs and substantial counsel fees.

The evidence and findings of the courts, as heretofore stated, conclusively show that petitioner's statements in his brief are utterly unsupported and untrue. Although Mr. Gore testified that when the claim was purchased he thought the paper was sound and would be paid off, dollar for dollar, he testified that appellant's son could not sell it for less than one-half the amount of the claim, and he, Gore, could not sell for the son for any price (R. 91 95);

that there was an element of chance of the property's being bid in by the first (mortgage) holders (R. 93, 98); that the buildings were deteriorating and the personal property was in considerable deterioration on account of moisture and not having heat in the house; that he felt better after the sale as they were skating on pretty thin ice; that the papers were up as collateral to the Mortgage Finance Company of Alexandria, Va. for $6,000 which was in default and there was a lien on the note for $5,200 for counsel fees due Mr. Boothe, which had to be paid, to avoid foreclosure,—aside from the fact that the property securing the note was involved in this bankruptcy proceeding and that the maker of the note had the reputation of being difficult to deal with (Ct's. Fdg. R. 68).

Petitioner was present when the evidence was taken before the Conciliation Commissioner—acting as Referee—heard Messrs. Gore, McNeill and Fuller testify as to his full knowledge of every fact found by the Referee and the District Court, was challenged to take the stand and testify but remained mute. He now attempts to impeach this sworn, open-Court testimony, by an *ex parte* insinuation by a purported affidavit, that the facts duly sworn to, and judicially determined by the District Court and the Court below, were unwarranted. (R. 86, 105)

To permit such a statement to be given any weight whatever would violate every rule of judicial propriety and due process in legal procedure.

For seven years petitioner has litigated with his creditors to avoid and evade paying his admitted obligations—all as listed by him in his bankruptcy petition. He has kept unwarranted controversies before the United States District Court, the Court of Appeals and this Court throughout these many years.

(*Littleton* v. *Rust*, 166 Fed. 2d 1007, cert. den. 334 U. S. 833)

As to the claim here considered, petitioner listed it in his bankruptcy petition as due absolutely and in full, to his son. He claims no credit against the amount listed as due; (R. 84, 102) the son sold the claim *in which petitioner had no interest or property right, and was and is satisfied with the price he received.*

Not a word of evidence has been produced in the entire record before the Referee, the District Court, or the court below, even intimating that petitioner didn't fully *understand, request and approve the transaction.* (R. 53, 68, 137, 138)

Not a scintilla of evidence appears in the petition for certiorari showing that Messrs. Gore and McNeill paid less for the second mortgage than its market value—and—on the contrary—*the record shows they paid more than anyone else, including petitioner,* would pay, and risked losing all by collateral or attorneys' lien foreclosures. (R. 136-138; 67, 68)

These conclusions are uncontradicted facts, from the record, as determined by three judicial sources, the Referee, who heard all the witnesses, the District Court, who reviewed and approved the Referee's findings and the Circuit Court of Appeals, in its well-considered, and able, analytical opinion on all the questions now again presented.

INTEREST

In the case of voluntary proceedings in bankruptcy when the assets are more than sufficient to pay all claims in full, and interest thereon, as in the present case, interest is payable out of this surplus to the date of payment. (R. 123)

Johnson v. *Norris,* 5 Cir., 190 F. 459
New York v. *Saper,* 336 U. S. 328, p. 330, note &
American Iron Co. v. *Seaboard Air Line,* 233 U. S. 261

Miles v. *Lindell*, 8 Cir., 107 F. 2d 729
In re Hopkins, D. C. R. I., 15 F. 2d 206
In re Norcor Mfg. Co., E. D. Wisc., 36 F. Supp. 978
Brown v. *Leo*, 2 Cir., 34 F. 2d 127

CONCLUSION

When the cases cited by Petitioner are thoroughly examined it will be found that they have been used by Petitioner, in this case, with the really vital principles decided, omitted; and, we submit, that when the cases are read in their entirety, they sustain fully and uniformly every act of McNeill and Gore in their dealings with Petitioner's son in the *purchase from him* of an obligation of Petitioner, at a price *higher than Petitioner or anyone else would pay and upon the urgent request of Petitioner.*

The above conclusions being inescapable it would appear to be clear, beyond any doubt, that the petition for certiorari herein should be denied.

Respectfully submitted,

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Respondents